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IN THE
Supreme Court of the United States

CASH AMERICA INTERNATIONAL, INC. AND
CASH AMERICA, INC. OF ALABAMA,
Petitioners,

v.

KEVIN SPARKS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court erred in failing to undertake any review of the trial court's ruling on a challenge to the constitutional excessiveness of respondent's punitive damage award.

2. Whether the punitive damage award imposed against petitioners and affirmed through the Alabama Supreme Court's silence violates petitioners' due process rights under criteria articulated in *BMW of North America, Inc. v. Gore*, particularly given the trial court's finding of no reprehensibility.

LIST OF PARTIES

The petitioners in this proceeding are Cash America International, Inc., a Texas Corporation, and one of its subsidiaries, Cash America, Inc. of Alabama. Cash America International, Inc. owns 100% of the stock of Cash America, Inc. of Alabama. No parent or publicly held company owns 10% or more of the stock of Cash America International, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cash America International, Inc. and Cash America, Inc. of Alabama (collectively, "Cash America" or "the company") respectfully petition this Court for a writ of certiorari to review a decision of the Alabama Supreme Court.

OPINIONS BELOW

The Alabama Supreme Court issued the opinion that is the basis of this writ on December 29, 2000 (App. 18a). The opinion is published at 2000 WL 1880336 (Ala. Dec. 29, 2000). The opinion and order of the Mobile County Circuit Court (App. 1a) is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Cash America International, Inc., is a Texas corporation engaged, through its subsidiaries, in the pawn brokerage business. Cash America, Inc. of Alabama is the company's Alabama subsidiary. (C-326-327, 329).[1] Respondent Kevin Sparks is a former management employee of Cash America who filed a lawsuit alleging he received an inadequate incentive bonus for his management services during the first nine months of 1995. He also named his supervisor, Bill Ewing, as a defendant. (C-1).

Sparks became employed by Cash America in 1987. In January 1995, Ewing was named divisional vice president for Cash America's division 5 stores located in the southeast. Sparks was promoted to one of two regional assistant vice presidents, reporting directly to Ewing. (R-154, 541). Sparks's base salary was raised by $10,000 to $58,000, among other allowances. (R-291, 293).

During the first quarter of 1995, the company began devising a new incentive bonus plan for management employees, and determined that the existing 1994 annual bonus plan would not be renewed for 1995. (R-523-524, 735-736). To ease the transition from the old bonus plan, the company authorized payment of a 9-month discretionary incentive bonus to managers for the first three quarters of 1995. (R-504, 532, 643). The company's president, Dan

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[1] "C" refers to the Mobile County Circuit Clerk's record. "R" refers to designations in the Mobile County Circuit Court trial transcript.

Feehan, notified Terry Kuntz, executive vice-president of operations, of the change in bonus structuring and expected Kuntz to disseminate this information to management. (R-524-525, 535).

In March 1995, Sparks became the only regional manager remaining in division 5, reporting directly to Ewing. (R-172-173). Sparks and Ewing both expected that Sparks would receive "a lot of incentive pay" as the only regional manager for division 5. (R-174). In October 1995, when Sparks learned that he would be receiving a 9-month incentive, he began trying to "calculate" the incentive he maintained he was "owed" under the old 1994 plan which was not in effect at the time. (R-324-325). He began collecting store productivity information on all the stores within his division from the company's home office in Fort Worth, Texas. He used this information to "calculate" a 9-month incentive in excess of $28,000. (R-326-327). Sparks candidly testified that home office was forthcoming with all information requested. (R-327-329).

The company did not agree that Sparks was "owed" a 9-month incentive in excess of $28,000. (R-334). Sparks, with Ewing's assistance, ultimately received a 9-month incentive in the amount of $7,500, more than three times higher than any incentive paid to any other regional manager during the time in question. (R-538, 756-757).

Sparks accepted the incentive, but was not satisfied and began missing significant work. Company officers became concerned and the president of the company, Feehan, asked human resources to look into the situation and attempt to assist Sparks. Feehan testified as follows:

> Well, I was, obviously, very concerned about Kevin and his situation and was very curious as to what the problems were and why—you know, why Kevin was missing work, and I asked Mr. Brockman at that time to investigate the situation and see if there is anything we

> could do. If there was a particular problem that Kevin was having, if there was anything that we could do to assist Kevin with whatever the issues were at that point.

(R-259). Feehan then requested that the human resources department go "beyond that level" and contact Sparks directly to try to convince Sparks to travel to Fort Worth and meet with Feehan personally to discuss whatever issues Sparks had. (R-529-530).

Sparks rebuffed all of Cash America's overtures. As Rob Brockman, with human resources, testified, "we made repeated attempts to contact [Sparks] and talk to him about this and to understand what was going on and we were genuinely concerned about what was happening to [Sparks] and [we didn't] understand why he was non-communicative." (R-746).

The company's home office attempted to set up three meetings with Sparks, at the company's expense, but on each occasion Sparks refused to meet with the company. It also sent a human resources representative from home office to Mobile to assist Sparks. Sparks did not even mention the incentive bonus plan at their meeting. (R-748-755).

The case proceeded to trial in June 1998. The jury awarded Sparks $150,000 in compensatory damages, and $1 million in punitive damages, on the theory that Sparks was defrauded during the bonus process. The jury exonerated Sparks's supervisor, Bill Ewing. (R-927).

In post-judgment proceedings, circuit court judge Christopher Galanos conducted a review of the punitive award for excessiveness under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and found none of the aggravating factors which would support a significant sanction in addition to compensatory damages. The court wrote:

> In *BMW*, the United States Supreme Court noted that the most important indicium of the reasonableness of a

punitive damage award is the degree of reprehensibility of the defendants' conduct. *See BMW*, 116 S. Ct. at 1599. It is clear from the holding in *Talent Tree* and *American Pioneer*, that to sustain an award of punitive damages, there must be a showing of malice or reprehensible conduct and these elements are absent in the present case.

. . .

The testimony provided very little evidence of conduct on the part of the defendants that the jury could have determined was gross, oppressive, or malicious. . . . The Alabama Supreme Court has recognized that torts causing only economic injury are less worthy of large punitive damages awards than torts inflicting injuries to health or safety. *See American Pioneer Ins. Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997).

. . .

The parties conceded that there was no similar past conduct involving the payment of an incentive bonus payment. . . In this case, the plaintiff failed to introduce evidence of prior misconduct and failed to present substantial evidence to support his claim that other employees suffered damages as a result of the defendants' conduct.

. . .

[T]he defendants attempted to meet with the plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The plaintiff admittedly refused to meet with Mr. Feehan at Cash America's expense.

. . .

[T]he plaintiff gave the defendants little or no opportunity to remedy the wrong.

(App. 10a-15a) (emphasis added). Nevertheless, Judge Galanos allowed Sparks's punitive award to stand, but

reduced it to $225,000, almost a quarter of a million dollars.[2] (App. 17a). Cash America noticed its appeal to the Alabama Supreme Court on September 9, 1998, and specifically requested that the court undertake a plenary review of Sparks's punitive award for excessiveness, under both federal and Alabama authorities. On December 29, 2000, the Alabama Supreme Court released its final decision (App. 18a) affirming the judgment as remitted by the trial court. The Alabama Supreme Court conducted no analysis of the punitive damage award. The court utterly failed to address or even cite *BMW v. Gore*, and undertook no appellate review of the trial court's remittitur analysis.

The only reference to punitive damages in the Alabama Supreme Court's decision was within the context of Cash America's motion for judgment as a matter of law on Sparks's punitive damage claim. On that issue, the court sustained without analysis the trial court's denial of Cash America's motion because, the court held, the record contained "substantial evidence" in support of the punitive claim. (App. 22a-23a).

REASONS FOR GRANTING THE WRIT

This case presents yet another chapter in Alabama's troubled history of due process violations associated with unwarranted punitive damage awards.[3] Ignoring clear constitutional authority to the contrary, in this case the Alabama Supreme Court failed to undertake any review of the excessiveness of a punitive award grossly out of

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[2] The trial court also remitted Sparks's compensatory award to $75,000. (App. 17a).

[3] *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 517 U.S. 1231 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 517 U.S. 1230 (1996); *Ford Motor Co. v. Sperau*, 517 U.S. 1217 (1996).

proportion to the gravity of the allegedly offensive conduct. The decision should be vacated and the Alabama Supreme Court should be required to perform its constitutional duty.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-23 (1991), this Court emphasized the critical importance of thorough appellate review of the excessiveness of punitive awards to insure compliance with due process. Moreover, this Court now has accepted certiorari in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035, in order to clarify the standard that the appellate courts must apply in reviewing punitive damage awards for excessiveness under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

The instant case presents an even more pressing problem than that in *Cooper Industries*, inasmuch as the Alabama Supreme Court failed to undertake *any* review of the trial court's excessiveness analysis. In a recent, strongly worded opinion, the Alabama Supreme Court has even acknowledged its constitutional responsibility to review *BMW v. Gore* determinations. *See Wal-Mart Stores, Inc. v. Goodman*, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000) (ordering significant remittitur and holding that a failure to accord plenary review of trial court's excessiveness determination would be an "abdicat[ion] of our responsibilities under *BMW*"). Cash America's constitutional due process rights, nevertheless, were ignored entirely by the Alabama Supreme Court. This Court now has an opportunity to redress this violation, as well as to provide needed guidance to the Alabama Supreme Court, which gave rise to the *BMW v. Gore* decision in the first place.

Meaningful appellate review is the primary check on runaway juries. *See Haslip, supra*; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). While the petitioner in the *Cooper Industries* case has urged this Court to adopt a stringent *de novo* standard of review applicable to all

appellate courts, and argues persuasively for such a result, Cash America was not even given the benefit of the scant review accorded petitioners in *Cooper Industries*. Meaningful appellate review plainly would have resulted in a substantial remittitur of the punitive award well below $225,000. The record is devoid of any significant evidence of aggravating factors associated with reprehensibility or recidivism, as the trial court meticulously recorded but erroneously failed to redress adequately.

I. CASH AMERICA WAS ENTITLED TO MEANINGFUL APPELLATE REVIEW OF THE TRIAL COURT'S CONSTITUTIONAL EXCESSIVENESS ANALYSIS

This Court specifically instructed the Alabama Supreme Court in *BMW v. Gore*, *supra*, to undertake a thorough constitutional due process analysis of all punitive damage awards, in consideration of three "guideposts" articulated by this Court. Before that, in *Haslip*, this Court recognized the necessity of appellate review to safeguard against due process violations. In Alabama, the jury is not permitted to perform any constitutional excessiveness analysis, so that the trial court is the primary arbiter for purposes of correcting excessive awards. *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). The present case illustrates the critical importance of meaningful appellate review of the trial court's due process analysis.

As this Court clearly recognized in *Haslip*, the importance of meaningful appellate review of punitive damages awards cannot be over-emphasized. There, this Court sustained the award at issue, in large part because of the thorough appellate review accorded to petitioner by the Alabama Supreme Court:

> Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards.

. . .

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion.
>
> . . .
>
> This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.
>
> . . .
>
> Also . . . the Supreme Court of Alabama ha[s] elaborated and refined the *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution.
>
> . . .
>
> The Alabama Supreme Court's post verdict review ensures that punitive damages awards are not grossly out of proportion to the offense.
>
> . . .
>
> Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections.

Haslip, 499 U.S. at 20-23. Thus, respondents in *Haslip* avoided a constitutional rebuke primarily as a result of Alabama's demonstrated appellate safeguards, which operated to hold the constitutional line with respect to respondents' punitive award. Cash America waited 2½ years to see those safeguards work properly while the Alabama Supreme Court held its case, only to be denied even a rudimentary review.[4] *See also Salve Regina College v.*

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[4] The Alabama legislature has attempted to legislate a stringent *de novo* standard of appellate review of punitive damages for excessiveness. *See Ala. Code* § 6-11-24(b) (1993) ("The appellate court shall independently reassess the nature, extent and economic impact of [a punitive] award and reduce or increase the award in light of all evidence.") But the Alabama Supreme Court eviscerated the statute, deciding the statute could only

Russell, 499 U.S. 225, 231 (1991) (extolling the virtues of independent appellate review of legal issues before multijudge panels).

The petitioner in *Cooper Industries* stresses that the Circuit Courts of Appeal, as well as the State appellate courts, are divided with respect to what type of standard of review must be applied to a trial court's excessiveness analysis. Cash America got *no* review. If this Court does not accept certiorari and vacate the Alabama Supreme Court's decision, Alabama will perhaps stand alone as the one jurisdiction wherein *no* appellate review of the *BMW v. Gore* factors is consistently required. *Compare Cash America v. Sparks*, No. 1972229, 2000 WL 1880336 (Ala. Dec. 29, 2000), *with Wal-Mart v. Goodman, supra* (recognizing Alabama Supreme Court's constitutional obligation to provide meaningful review of trial court's *BMW v. Gore* analysis).[5] This result is untenable, particularly given Alabama's troubled history in dealing with grossly excessive punitive damage awards.

The Eleventh Circuit has articulated a *de novo* review standard for excessiveness determinations. *See Johansen v. Combustion Eng's, Inc.*, 170 F. 3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). The Alabama Supreme Court articulated a similar standard which it applied in *Wal-Mart v. Goodman, supra*. Under this standard, the lower court's underlying factual findings are reviewed for clear

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mean that the appellate courts (as with every case) must remain "free from improper influences." *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991).

[5] Constitutional due process and equal protection concerns also are implicated by the Alabama Supreme Court's apparently arbitrary practice of providing meaningful appellate review of the *BMW v. Gore* factors for certain defendant/appellants, such as Wal-Mart, but providing no appellate review for other similarly situated defendant/appellants, such as Cash America.

error, but the ultimate constitutional inquiry is conducted *de novo*. *Johansen*, 170 F. 2d at 1334. This standard avoids the constitutional hazards lurking behind deferential standards of review, as petitioners argued convincingly in the *Cooper Industries* case. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (appellate review must be sufficient to "insure[] that punitive damage awards are not grossly out of proportion to the severity of the offense"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87-88 (1988) (O'Connor, J. concurring) (substantial and unpredictable impact of windfall recoveries from punitive damages necessitates careful appellate scrutiny of such awards).

Cash America respectfully submits that this writ should issue, the decision should be vacated, and the Alabama Supreme Court should be required to conduct a proper review of this punitive award in compliance with this Court's decision in *BMW v. Gore* and the anticipated decision in *Cooper Industries*.

II. CASH AMERICA'S DUE PROCESS RIGHTS WERE VIOLATED AND PROPER APPELLATE REVIEW WOULD HAVE RESULTED IN A SUBSTANTIAL REMITTITUR WELL BELOW $225,000

Two hundred twenty-five thousand dollars is a breath-taking fine to levy against defendants that, as meticulously recorded by trial court, evinced very little, if any, evidence of aggravating factors associated with reprehensible conduct. The first, and most important, of the *Gore* guideposts is the reprehensibility, or lack thereof, of the defendant's conduct. Thus, not every punishable act is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. . . [P]unitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576.

Here, the trial court's *BMW v. Gore* analysis, from a factual standpoint, is not clearly erroneous in its finding of neither reprehensibility nor any significant evidence of the other *BMW v. Gore* aggravating factors. But the court misapplied *BMW v. Gore* by allowing a $225,000, three-to-one punitive award to stand despite the complete lack of reprehensibility on the part of Cash America. "Both unlimited judicial discretion," as well as unlimited jury discretion in the fixing of punitive damages "may invite extreme results" that offend constitutional due process. *Haslip*, 499 U.S. at 18. As the Court wrote in *BMW v. Gore*, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582.

The converse proposition is equally true. Thus, where, as in the instant case, the jury awards relatively high compensatory damages (here, $150,000 as remitted to $75,000) for conduct that bears none of the aggravating factors associated with reprehensibility, a three-to-one punitive damage ratio is constitutionally excessive. This Court wisely has rejected a "mathematical bright line" approach to fixing punitive damages. The three-to-one ratio imposed by the trial court in this case and affirmed through the Alabama Supreme Court's silence should not stand.

Petitioners in *Cooper Industries* argued persuasively that admitting and accepting responsibility for offensive conduct should lower the constitutional limit of any punitive award. Cash America proved that it did not engage in oppressive conduct. Indeed, while Sparks was an employee and before litigation was even threatened, Cash America undertook every possible affirmative step to address Sparks's concerns but Sparks would not permit any remedial action, as the trial court noted. Sparks rebuffed Cash America on every occasion, opting instead to take his chances with a large

punitive award. Clearly, Cash America had no notice that a $225,000 punitive fine would be imposed against it for paying a 9-month premium management incentive of $7,500 to Sparks and thereafter making every effort to reach out to him—including directly involving the company president—when he did not respond.

As the petitioners in *Cooper Industries* argued cogently, the appellate courts cannot simply pay lip service to the constitutional mandate announced in *BMW v. Gore*, *supra*. The Alabama Supreme Court's decision should be vacated, and the Alabama Supreme Court should be instructed to undertake a proper analysis of the *BMW v. Gore* factors. Such appellate review would have resulted in a substantial remittitur of the $225,000 punitive award, which the trial court improperly allowed to stand given the dearth of reprehensibility in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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